order to the effect that leave had been given to amend generally, or to withdraw a particular plea, or whatever it might be, and the order would also have dealt specifically with the costs of such further amendments or withdrawal, instead of, stating merely that the costs of "consequential amendments" were to be the defendants' in any event.

In my view, it was never intended that the order of the 14th August should give the defendants leave to amend generally, nor do I think the language of the order is such as to require this meaning to be placed upon it. The defendants sought to support their argument by reference to the case of *Han Poo (Boo) Joon v. Baey Kim Swee & Co. Ltd.*[2] where a defendant who amended without leave pursuant to Order 29 rule 5, and introduced into his amendments matters not consequential upon amendments to the Statement of Claim, was allowed to do so on payment of the costs of the plaintiff's application to strike out. The short answer to this argument is that the decision in that case dealt with an amendment delivered without leave, under Order 29 rule 5 whereas the present case is concerned with construction of a Judge's order made, in the exercise of his discretion, after hearing argument. It is, therefore, no precedent for the present case, nor do I think, in view of the important difference between the two procedures, that it provides any useful guidance in this case. Accordingly, therefore, the defendants' argument on the second point also fails.

For these reasons, I am of the opinion that the discontinuance of the counter-claim and the amendment of the defence by the withdrawal of the plea of agency were unauthorised and contrary to the Rules of Court. I propose, therefore, to order that the defence be struck out unless the defendants apply to the Court for leave to discontinue their counter-claim and to amend their defence by withdrawing the plea of agency before 10.30 a.m. on the 30th November 1956.

The plaintiff must have the costs of this application.

Order accordingly.

Solicitors: *Christopher & Francis; Braddell Bros.*

REG. v. MURUKAIYAN RASOO

[A. Cr. J. (Whitton J.) October 25, 1956]

[Singapore — Criminal Appeal No. 112 of 1956]

Criminal Trial — Sentence — Inadequacy of sentence.

This was an appeal by the Public Prosecutor against the sentence of binding over passed by the District Judge on the respondent after he was convicted of voluntarily causing grievous hurt. In passing the sentence, the learned District Judge said: "I am aware that the offence itself is a serious one, but taking into consideration the circumstances of this case and the personality of the accused, I did not think a sentence of imprisonment would serve any useful purpose. He is an intelligent young man but highly sensitive and emotional."

Held: (1) a Court dealing with the question of sentence alone must proceed on the assumption that the accused in whom some element of mental instability has been proved is in no different position as far as *mens rea* is concerned from an accused on whose behalf no such plea has been advanced;

(2) in deciding the appropriate sentence the first and foremost consideration by which the Court should be guided is the public interest. In this case the learned District Judge was wrong in inflicting a merely nominal punishment.

MAGISTRATE'S APPEAL,

S. E. Teh (Crown Counsel) for the appellant.

P. F. X. Leonard for the respondent.

Whitton J. : — This is an appeal by the Public Prosecutor against a sentence of binding over for one year in the sum of $500 passed by a District Judge on the respondent after he was convicted of voluntarily causing grievous hurt.

The complainant was a young woman named Theresa Thangasamy. For a period in 1955 she was engaged to the respondent, but the engagement was broken off in August. There is some evidence of friction between them subsequently in the Income Tax Department by which they were both employed, but there is no suggestion of any dispute or provocation at any date shortly before 1st February 1956 when the offence was committed. On that morning shortly before 9 o'clock the complainant had with some girl friends gone up some steps at an entrance to the Fullerton Building leading to a lift when the respondent suddenly appeared and attacked her with a knife, inflicting two injuries, the first about 4 inches deep on the chest, and the second — after she had fallen to the ground — on the abdomen, this wound being about ½ inch deep. In the medical officer's opinion the first injury could have proved dangerous to life. The complainant was detained thirteen days in hospital.

The learned District Judge gave the following reasons for passing what on the face of it is a very light sentence for an assault of this nature with a knife :—

"The circumstances leading up to this case as far as the accused was concerned are unfortunate. After a series of bitter disappointments during the past 5 or 6 years he had to suffer another disappointment in his love affair with the present complainant. I am aware that the offence itself is a serious one, but taking into consideration the circumstances of this case and the personality of the accused, I did not think a sentence of imprisonment would serve any useful purpose. He is an intelligent young man but highly sensitive and emotional. After having watched him in Court and after hearing his evidence and that of Dr. Robinson (D.W. 9), I consider that a finding of guilt against him would be a sufficient punishment. I had thought of

imposing a fine on him in addition to binding him over, but after considering that he would probably lose his job with the Income Tax Department I decided to forego the fine."

Now it is well established that an Appellate Court will not enhance a sentence unless it is manifestly inadequate or wrong in principle. In considering the present case it is obvious that the learned District Judge gave full weight, very properly, to the circumstances of the respondent, and it is clear that while on the one hand the respondent borne up to now a good character and has been a satisfactory officer in the Income Tax Department, he is of an abnormally sensitive nature, and, to quote the phrase of Dr. Robinson, a mental expert who gave evidence at the trial, is "emotionally immature", an illustration of this weakness being that some years ago after failing in an examination he attempted to commit suicide. His counsel at the appeal put forward an argument to the effect that the spontaneous nature of the assault in circumstances in which it must have been obvious to the respondent that his offence would be witnessed and he himself apprehended was an indication that he had no control over himself at the time. In this connection it must be appreciated that the conviction amounted to a finding by the learned District Judge that the respondent had formed an intention of causing hurt, and it may be also relevant to add that as the law stands the position is, in my view, that it is not a defence open to an accused person to say that he was under the influence of a mere "uncontrollable impulse of the mind" co-existing with the full possession of the reasoning faculties (*vide Halsbury* 3rd Ed. Vol. 10 p. 289) I think a Court dealing with the question of sentence alone must proceed on the assumption that the accused in whom some element of mental instability has been proved is in no different position as far as *mens rea* is concerned from an accused on whose behalf no such plea has been advanced.

I do not think it is open to question that in deciding the appropriate sentence the first and foremost consideration by which the Court should be guided is the public interest. Applying that principle to this case I would say the determining factor is whether it is in the public interest an impression should be created that in a case where an accused has inflicted without provocation on a fellow human being potentially fatal knife wounds the Court may be prepared, because the accused suffers from some temperamental defect or because he has been the victim of misfortune, to inflict a merely nominal punishment? I would say that is not because to hold otherwise may suggest the Courts consider the circumstances of the individual offender are more important than the protection of innocent members of the community from injury to their persons, or from risk even to their lives. In my view the learned District Judge did not give due weight to this aspect of the matter. He was in this case faced with a difficult problem, and clearly gave it most careful consideration. I have also found it a difficult problem myself, and I am glad that I have had the advantage of having had the case for the respondents so ably argued by Mr. Leonard. But after full reflection I have formed the conclusion that the very least sentence which be appropriate is one of six months imprisonment, and I allow the appeal by substituting such a sentence for that passed by the District Judge.

Order accordingly.

Solicitors : *Sisson & Delay.*

KM.N.SP.N. VALLIAMMAI ACHI (f) v. A.R.S. NACHIAPPA CHETTIAR

[C. A. (Mathew C.J., Whyatt C.J. (S) and Rigby J.) September 3, 4, and November 17, 1956]

[Penang — F.M. Civil Appeal No. 20 of 1956]

Action for administration — Breach of trust — Claim by defendant — Third party proceedings — Contribution or indemnity against foreign executrix and another both domiciled and resident outside jurisdiction — Third party proceedings against foreign executrix not properly constituted — Nullity — Practice — Service out of jurisdiction — Rules of the Supreme Court O. 11, r. 1(h) — "Properly brought" — Unconditional appearance by foreign executrix.

By his will dated September 23, 1923, the testator, who died on September 24, 1929, appointed the respondent (the defendant in the main action), the appellant's husband, who died in 1938, and the second third party as his executors. Probate was taken out locally by the respondent only.

The appellant is the executrix named in her deceased husband's will, but did not obtain local probate: administration of his estate was granted locally to 2 attorneys appointed by her, one of whom died before the third party proceedings were commenced.

In an action by the sole beneficiary under the will of the testator brought against the respondent only, judgment was obtained on April 23, 1954 by admission for an account of his administration and for necessary inquiries on the footing of wilful default. The respondent thereafter obtained leave to issue and serve third party notices against the appellant, as executrix of her deceased husband's will, and the second third party outside the jurisdiction, claiming contribution or indemnity against them. Both the appellant and the 2nd third party were served out of the jurisdiction. The appellant entered unconditional appearance. The 2nd third party did not enter appearance.

Both the third parties are domiciled and resident in India.

A motion by the appellant to discharge the order giving leave to issue and serve third party notice out of jurisdiction and to set aside the third party proceedings was dismissed by Spenser Wilkinson J.

Held, by the Court of Appeal, reversing Spenser Wilkinson J.: (1) third party proceedings must be looked at as independent proceedings between the defendant as plaintiff and the third parties as defendants;

(2) a claim against a foreign executor, who has not obtained a grant of probate locally, cannot be maintained